No. 84-1617

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION

Petitioner

V.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and GREYHOUND LINES, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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67pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Interstate Commerce Commission can refuse to allocate expenses between interstate and intrastate bus service in intrastate rate cases under the Bus Regulatory Reform Act.

2. Whether the Interstate Commerce Commission can prescribe an intrastate bus rate increase without evidence supporting the amount of the increase.

3. Whether the Bus Regulatory Reform Act preempts state laws requiring the filing of intrastate rate reductions.

PARTIES

The caption of this petition contains the names of all parties to this action in the Eleventh Circuit. The Alabama Public Service Commission is an agency of the State of Alabama.

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ALABAMA PUBLIC SERVICE COMMISSION
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UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION
and GREYHOUND LINES, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Alabama Public Service Commission respectfully petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Neither the decision of the Interstate Commerce Commission nor the opinion of the Eleventh Circuit is reported in any official or known unofficial report.

It should be noted that another decision has been entered under the Bus Regulatory Reform Act, and a Petition for Certiorari is pending. Commissioner of Transportation v. United States, 750 F.2d 163 (2nd Cir., 1984); Petition for Certiorari pending, No. 84-1135.

JURISDICTION

The Judgment of the Eleventh Circuit was entered on February 22, 1985. No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 17 of the Bus Regulatory Reform Act of 1982, 49 U.S.C. 11501(e) (1984 Supp.), provides in relevent part:

> (e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title --
>
> > (A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and
> >
> > (B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination

against or imposes an unreasonable burden on interstate or foreign commerce

(2) For purposes of paragraph (1)B) of this subsection, there shall be a rebuttable presumption that --

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds --

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such

State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing application under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency of other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in

excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

STATEMENT OF THE CASE

After the Alabama Public Service Commission (APSC) denied its rate increase application, Greyhound Lines, Inc. (Greyhound) petitioned the Interstate Commerce Commission for the increase. Greyhound alleged that its Alabama intrastate rates, both before and after the increase, would be lower than comparable interstate rates. Greyhound also filed the state record. It showed, for the pro forma year, a Greyhound system (East) operating ratio of 96.26%, an Alabama (combined interstate and intrastate) operating ratio of 101.28%, and an Alabama intrastate operating ratio of 90.39%. The proposed rate increase would reduce the Alabama intrastate operating ratio to 84.91%. The state record also showed

that intrastate fares were and would be lower than interstate fares between selected pairs of Alabama cities.

The APSC moved to dismiss Greyhound's petition and filed a reply. Attached to these documents was Greyhound's Alabama intrastate reduced fare tariff filed within 3 days of the petition. The APSC contended that the lower intrastate operating ratio and the intrastate reduced fare tariff showed the absence of a burden on interstate commerce; and no evidence supported the amount of rates sought.

Greyhound filed rebuttal, alleging that operating ratios are a relic of another era, no differences in operating conditions, services or costs were established, and the reduced fare tariff was filed for marketing and competitive reasons.

The Interstate Commerce Commission denied the motion to dismiss and granted Greyhound's petition. The contemporaneous West Virginia rate case, MC-C-10901, was cited as authority for rejecting operating ratios, and the increase requested was granted without discussion of the amount. In the West Virginia rate case, the Interstate Commerce Commission stated:

> " The calculation of intrastate versus combined operating ratios involves a number of highly arbitrary accounting assumptions for allocating the revenues and especially the expenses between interstate and intrastate service. The essence of the problem is that both types of service are provided simultaneously on the same bus and by the same personnel: a given bus typically contains both interstate and intrastate passengers. There is no non-arbitrary method of allocating the common costs of providing these two types of service." (Appendix, page 24a)

On appeal, the Eleventh Circuit affirmed without an opinion. The jurisdiction of the Eleventh Circuit was invoked pursuant to 28 U.S.C. 2342(5).

REASONS FOR GRANTING THE WRIT

BACKGROUND

(A) Overview of the Bus Regulatory Reform Act.

In August, 1982, Congress addressed the problems it found in the bus industry by passing the Bus Regulatory Reform Act of 1982, Public Law 97-261, 96 Stat.1102 (1982). (Bus Act). This Act adopts a two pronged approach: reduction of federal regulation and selective preemption of state regulation. Federal regulation is reduced by easing entry (Section 6 of the Bus Act, 49 U.S.C. 10922(c)), and by establishing a zone of rate freedom (Section 11 of the Bus Act, 49 U.S.C. 10708(d)(4) & (5)). Selective state

preemption was adopted by authorizing the Interstate Commerce Commssion to approve intrastate service (Section 6 of the Bus Act, 49 U.S.C. 10922(c)(2)(A) and (B)), by authorizing the Interstate Commerce Commission to approve abandonment of intrastate service (Section 16 of the Bus Act, 49 U.S.C. 10935), and by authorizing the Interstate Commerce Commssion to prescribe intrastate rates. (Section 17 of the Bus Act, 49 U.S.C. 11501(e)(1) - (3). State action on time schedule changes and rate reduction filings was also prohibited. (Section 17 of the Bus Act, 49 U.S.C. 11501(e)(5)).

Intrastate bus rates are to be prescribed by the Interstate Commerce Commission if the state agency does not act within 120 days on a rate filing or denies a rate filing, and the intrastate rates discriminate against or unreasonably bur-

den interstate or foreign commerce. 49 U.S.C. 11501(e)(1). Discrimination against interstate or foreign commerce must be proven in all cases, but rebuttable presumptions are provided for unreasonable burdens on interstate or foreign commerce. 49 U.S.C. 11501(e)(2).

(B) Federalism

Concepts of federalism have an impact in this case. These concepts arise from the fact that this country does not have a centralized government with political subdivisions. Instead, the Constitution of the United States established a system of government consisting of a national government and sovereign state governments. These concepts underly the Tenth Amendment and are implicit elsewhere. Thus, in Article IV, state institutional integrity is recognized (Section 1), state territorial integrity is recognized

(Section 3), and the sovereign power of elected state representatives is recognized (Section 4). In addition, concepts of federalism are recognized in this court's decisions. Community Communications Co. v. City of Boulder, 455 U.S. 40, 53 (1982); Parker v. Brown, 317 U.S. 341, 359 (1943).

As applied to this case, concepts of federalism create deference for the states. LaFayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978). Restrictions upon the traditional power of states to regulate their local transportation are confined to the plain mandate of Congress. Palmer v. Commonwealth of Massachussetts, 308 U.S. 79, 84 (1939). Finally, when the federal government must act in intrastate transportation, the justification for the exercise of the federal power must be made definitely and clearly

apparent. Chicago M. St. P. & P. R. Co. v. Illinois, 355 U.S. 300, 306 (1958).

ALLOCATION OF EXPENSES

Under the Constitution of the United States of 1787, Congress has the power to regulate commerce among the several states, and to make all laws which shall be necessary and proper for carrying into execution this power. (Article I, Section 8). Laws made pursuant to the Constitution are the supreme law of the land. (Article VI). These provisions also give the federal government the power to alter intrastate rates in some cases. Houston, East & West Texas Railway Company v. United States, 234 U.S. 342 (1914).

This power to alter intrastate rates has been explored and developed in connection with rail rates. It was there established that the level of intrastate rates unreasonably burden interstate com-

merce, and the federal government can alter intrastate rates, when intrastate operations do not contribute a fair share of revenue needs for the interstate carrier. Public Service Commission of Utah v. United States, 356 U.S. 421, 424 & 425 (1958); King v. United States, 344 U.S. 254, 270-271 (1952); North Carolina v. United States, 325 U.S. 507, 520 (1945). In addition, a high standard was required, with clear justification for federal interference in intrastate rates. Chicago, M. St. P. & P. R. Co. v. Illinois, 355 U.S. 300, 306 (1958).

The lack of a fair contribution to net revenue must be established by allocating investment and expenses between the federal and state jurisdictions. Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 588 - 589 (1945); Smith v. Illinois Bell Telephone Co., 282

U.S. 133, 150 (1930); The Minnesota Rate Cases, 230 U.S. 352, 461 (1913); New York Telephone Company v. Federal Communications Commission, 631 F.2d 1059, 1062 (2nd Cir, 1980). With the railroads, this allocation process produced operating ratios that could be compared. Public Service Commission of Utah v. United States, 356 U.S. at 426; King v. United States, 344 U.S. at 262-263. A lower intrastate operating ratio shows that a smaller percentage of revenue was consumed by expenses. Public Service Commission of Utah v. United States, 356 U.S. at 426; D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, 350 F.2d 753, 757 & 759 (D.C. Cir., 1965). Therefore, it is submitted, a lower intrastate operating ratio shows that intrastate operations were more profitable, and do not burden interstate commerce.

These principles were adopted by Congress in the Bus Act by the use of the term "unreasonable burden on interstate Commerce." 49 U.S.C. 11501(e)(2)(A). Nevertheless, the Interstate Commerce Commission refused to consider operating ratios because they involve the allocation of expenses. Instead, it simply granted the petition for an increase in intrastate rates.

This court should hear this case, and reverse the Eleventh Circuit's affirmance of the Interstate Commerce Commission's Decision, for two reasons. First, this case presents an important question of federal law that has not been, but should be, settled by this court. This court has not reviewed an intrastate rate case under the Bus Act. Second, by affirming the Interstate Commerce Commission Decision, the Eleventh Circuit has sanctioned a

departure from this court's decisions. This Court has established criteria for determining, on a case by case basis, when the level of intrastate rates unreasonably burden interstate commerce, but the Interstate Commerce Commission's Decision refuses to apply these criteria.

It has been acknowledged that separations of intrastate and interstate costs and revenues are not required where the conditions are substantially the same. Illinois Commerce Commission v. United States, 292 U.S. 474, 483-484 (1934). The Interstate Commerce Commission stated that the same equipment and personnel provide both intrastate and interstate service at the same time. This is not always true, however, as shown by Greyhound's Birmingham - Atlanta operations. (Appendix, page 34a) In operations between Birmingham and Anniston, the bus and driver provide both services, but on the Alabama miles between

Anniston and the state line only interstate service is provided.1/ In addition, all Alabama mileage provides only interstate service on the express run from Birmingham to Atlanta. Therefore, an interstate fare must cover the less profitable interstate only service as well as the more profitable joint servdice, but an intrastate fare need only cover the more efficient joint service. Consequently, conditions are not substantially the same for interstate and intrastate bus service.

The Interstate Commerce Commission's statement that the same equipment and personnel provide both services also shows the importance of this case. The Commission is indicating its conviction that intrastate rates should be the

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1/ An exception occurs on the one run each way that stops in Heflin, Alabama.

same as interstate rates. Therefore, it will systematically ignore state commission decisions and systematically grant intrastate bus rate increases. In the process, it will have made irrebuttable the rebuttable presumption of an undue burden on interstate commerce. (49 U.S.C. 11501(e)(2)(A)) and will have ignored the decisions of this Court.

AMOUNT OF THE RATE INCREASE

The Bus Act provides a rebuttable presumption that lower intrastate rates unreasonably burden interstate commerce. 49 U.S.C. 11501 (e)(2)(A)(i). If a finding of an unreasonable burden on interstate commerce is made, the Interstate Commerce Commission is to prescribe the intrastate rates. 49 U.S.C. 11501 (e)(1). The Interstate Commerce Commission, however, simply granted Greyhound's proposed

rate because the proposed rate is lower than the interstate rate.

Congress did not direct the Interstate Commerce Commission to set intrastate rates at the interstate level, nor to allow rate freedom if the intrastate rates are below the interstate rates. Therefore, the Interstate Commerce Commission must have a rational basis, and evidence to support, the intrastate rates it prescribes. Public Service Commission of Utah v. United States, 356 U.S. at 428; North Carolina v. United States, 325 U.S. at 512. Consequently, the Interstate Commerce Commission Decision, and the Eleventh Circuit affirmance, conflicts with the decisions of this court. In addition, the intrastate bus rate prescription question is an important one that has not been, but should be, settled by this court. Indeed, the unsupported approval

of the rates sought, after denial by the state Commission, is an abandonment of federalism considerations, and at least should not receive judicial sanction without thorough consideration. Therefore, this point should be considered by this court, and the Eleventh Circuit should be reversed.

INTRASTATE RATE REDUCTION FILINGS

This court has consistently held that state preemption is limited to the clear and manifest intention of Congress. Ray v. Atlantic Richfield Company, 435 U.S. 151, 157 (1978); James v. Rath packing, 430 U.S. 519, 525 (1977); Palmer v. Commonwealth of Massachussetts, 308 U.S. 79, 84 (1939). The Bus Act prohibits state action on filings for bus rate reductions, but does not exempt the bus lines from state laws requiring that rates be filed. 49 U.S.C. 11501 (e)(5). Nevertheless, the

Interstate Commerce Commission Decision holds that intrastate rate reductions are not required to be filed with the states. (Appendix, page 6a (footnote)). This decision, and the Eleventh Circuit's affirmance, is thus contrary to this court's decisions. In addition, this point should be addressed by this court because of the states' interest in having only filed rates charged by the bus lines.

THE NEW YORK CASE

The Second Circuit Court of Appeals has issued its opinion rejecting operating ratios and allocation of expenses. Commissioner of Transportation v. United States, 750 F.2d 163, 170 (2nd Cir., 1984). That opinion is not persuasive for two reasons. First, it is contrary to this court's decisions, and does not show that the decisions requiring allocation of expenses (Supra, pg 15-16) were considered.

Second, the rejection of operating ratios and allocation of expenses was not required to decide that case because the intrastate operating ratio was higher. 75 F.2d at 165 & 170.

CONCLUSION

This court has recently recognized concepts of federalism, and held that these concepts are normally protected by the political process. Garcia v. San Antonio Metropolitan Transit Authority, U.S., 105 S. Ct. 1005 (1985). As shown hereinabove, these concepts are to be applied when a federal agency sets intrastate rates on a case by case basis. The Interstate Commerce Commission, however, has failed to recognize these concepts, and has failed to follow the decisions of this court, in its review and approval of intrastate bus rates. This action has now been approved by the Eleventh Circuit. Consequently, Petitioner prays that a Writ

of Certiorari will be issued to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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Alabama Rate Case	2a
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-7374

ALABAMA PUBLIC SERVICE COMMISSION,

Petitioner,

versus

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

GREYHOUND LINES,

Intervenor.

Petition for Review of an Order of the
Interstate Commerce Commission

(February 22, 1985)

Before HENDERSON and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10904

PETITION OF GREYHOUND LINES, INC., FOR REVIEW OF A DECISION OF THE ALABAMA PUBLIC SERVICE COMMISSION PURSUANT TO 49 U.S.C. 11501

Decided: May 16, 1984

By petition filed March 20, 1984 Greyhound Lines, Inc.(Greyhound or petitioner) seeks review pursuant to 49 U.S.C.11501(e) of a decision of the Alabama Public Service Commission (Alabama or State) which denied Greyhound's proposed intrastate fare increases. Petitioner asserts that the denial of its request causes unreasonable discrimination against, and imposes an unreasonable burden on, interstate commerce. Greyhound requests that this Commission review the record and prescribe fares at the level originally proposed by petitioner. Alabama has replied to the petition, and Greyhoud filed rebuttal.

This petition is filed under Section 17 of the Bus Regulatory Reform Act of 1982 (Bus Act), Pub. L. 97-261, 96 Stat. 1102, codified at 49 U.S.C. 11501(e). Section 17 permits an interstate motor common carrier of passengers to seek this Commission's review of: (1) a State decision resulting in intrastate rates, rules, or practices which unreasonably discriminate against, or impose an unreasonable burden on, interstate or foreign commerce; or (2) a State's failure to act within 120 days on a carrier's request for permission to establish a rate, rule, or practice. Regulations to implement Section 17 were adopted in Ex Parte No. MC-160, Procedures for Review of Intrastate Bus Rates, 133 M.C.C. 10 (1982), and are codified at 49 CFR 1143.

PRELIMINARY MATTERS

Alabama has filed a motion to dismiss the petition based upon Greyhound's filing on March 23, 1984 of reduced rates for its intrastate movements. Alabama claims that Greyhound's filing of reduced intrastate fares establishes the absence of a burden on or discrimination against interstate commerce, and that the issues raised in the petition are effectively moot. Greyhound states that, contrary to Alabama's allegations, this proceeding is not moot because the fares referred to were initiated for marketing and competitive reasons, and represent only one-tenth of one percent of Greyhound's existing Alabama service offerings. We deny Alabama's motion to dismiss bescause the presumptions made by Alabama are erroneous and unsupported by the weight of the evidence.

BACKGROUND

On October 14, 1983, Greyhound, through its agent the National Bus Traffic Association, Inc., filed an application with Alabama seeking to increase its intrastate passenger fares by 20 percent on its Alabama intrastate movements. On November 10, 1983, the State entered its order suspending the request and deferring any rate increase until January 11, 1984, and scheduling Greyhound's rate request for hearing on December 14, 1983. On January 6, 1984, the State entered another order extending the suspension period and deferring any rate increase to February 24, 1984.

By order dated February 13, 1984, Alabama denied Grehound's rate increase. In its decision, Alabama concluded that Greyhound did not produce any evidence to demonstrate a need for increasing its present Alabama intrastate fares based upon either future or present

operating costs. Additionally, because Greyhound had reduced its fares on intrastate operations, Alabama presumed that any intrastate fare Greyhound charged was sufficient to sustain a profitable operation. In addition, the State concluded that carriers are required to file reduced rate publications involving intrastate fares with the applicable state regulatory agency, and directed Greyhound to do so.*/

CONTENTIONS OF THE PARTIES

Greyhound here petitions the Commssion to review the State decision denying its proposed intrastate rate increases. Petitioner claims

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*/ This conclusion is incorrect. Under the Bus Act, State Regulatory agencies no longer have jurisdiction over intrastate rate reductions except to the extent that they may require 30-days notice of changes in schedules. They may not, however, require carriers to file reduced rate publications with them. 49 U.S.C. 11501(e)(5).

that it is being victimized by its inability to charge intrastate rates that are commensurate with its interstate rates for comparable movements. It maintains that the sought increases merely represent an attempt to overcome an existing artificially depressed level of rates. Greyhound further states that Alabama failed to act on the requested rate increase within the 120-day statutory period. It also points out that under 49 U.S.C. 11501(e)(2)(A)(i), where an intrastate rate is lower than a comparable interstate rate, a rebuttable presumption arises that the intrastate rate causes unreasonable discrimination against and imposes an unreasonable burden on interstate commerce. It argues that Alabama's failure to grant the requested increases on its intrastate routes, where significant interstate-intrastate rate disparities are present, results in just such a burden. Greyhound submits a comparison chart which illustrates a

30 to 37 percent disparity between its intra state rates and its interstate rates for the same passenger service between selected points in Alabama. As an example, Greyhound's intrastate rate for travel between Birmingham and Montgomery is $13.20 while its interstate rate is $18.05. Similarly, its intrastate rate for travel between Mobile and Selma is $20.45 while its interstate rate is $28.15. Petitioner further avers that its proposed 20 percent increase will still leave its intrastate rates 10 to 12 percent below the comparable interstate rates.

In reply, Alabama restates its argument made at the State level that the operating ratio statistics indicate that Greyhound's intrastate operations are profitable. Based on this, it claims that it has rebutted the 49 U.S.C. 11501(e)(2)(A)(i) presumption relied on by petitioner. It also contends that, rather than burdening interstate commerce, Greyhound's intrastate fares actually subsidize

interstate fares. It further asserts that in recent filing for intrastate rate reductions, Greyhound, in effect, admitted that the company's intrastate rates do not burden interstate commerce.

The State does, however, concede that a comparison of intrastate and interstate fares between selected pairs of Alabama cities shows that increases ranging from 30.48 percent to 37.81 percent would be needed to bring the intrastate fares up to the interstate fares and that the proposed increase would result in intrastate fares ranging from 87.05 percent to 91.59 percent of the interstate fares.

In its rebuttal statement, Greyhound states that the use of operating ratios as indicators of profitability is misleading and antiquated. It avers (i) that operating ratios reflect a purely mathematical allocation of certain expenses to revenues; (ii)

that the methodology used to compute intrastate operating ratios is deeply rooted in the State's historic administrative practice and its rules and regulations; and (iii) that operating ratios do not reflect actual or anticipated real world financial performance. Therefore, Greyhound submits that operating ratio analysis, particularly pro forma analysis based on the State's procedures involving intrastate rate increases, is an inadequate and unrealistic basis for rebutting the presumption set forth at 49 U.S.C. 11501(e)(2)(A)(i).

DISCUSSION AND CONCLUSIONS

After full consideration of the State record and decision, and of the pleadings filed before us, we conclude that Alabama's denial of petitioner's proposed fare increases on its Alabama routes results in intrastate rates which cause unreasonable discrimination

against, and impose an unreasonable burden on, interstate commerce. Accordingly, we approve the sought increases on these routes.

Subsection 11501(e)(2)(A)(i) establishes a rebuttable presumption that a rate, rule, or practice applicable to intrastate transportation of passengers unreasonably burdens interstates commerce if it results in the carrier charging an intrastate rate which is lower than the rate applicable to comparable interstate service. The record clearly establishes that Greyhound's intrastate passenger fares, even at the proposed level, are significantly lower than comparable interstate fares. Protestant has not shown ay differences in operating conditions, services, or costs between intrastate and interstate operations that would justify the disparity in applicable fares and rebut the statutory presumption. Alabama argues in its reply that various operating ratios indicate that approval of the requested increase is not warranted. As we

explained at length in MC-C-10901, Petition of Greyhound Lines, Inc. for Review of a Decision of the West virginia Public Service Commission Pursuant to 49 U.S.C. 11501, served April 18, 1984, the calculation of intrastate versus interstate operating ratios on mixed operations involves arbitrary accounting assumptions. For the same reasons explained in the cited decision we do not find these calculations sufficiently reliable enough to rebut the statutory presumption raised by the rate discrepancies. By contrast, Alabama concedes that intrastate fares are below comparable interstate fares. This continued rate discrepancy results in subsidization of Alabama intrastate operations by interstate Alabama operations, representing an unreasonable burden on interstate commerce.

Accordingly, Greyhound's showing that its intrastate rates are lower than comparable interstate rates, and thus burdensome on interstate commerce, stands unrebutted. We, there-

fore, will prescribe the sought intrastate passenger fare increase of 20 percent.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

We find:

The Alabama Public Service Commission decision of February 13, 1984, results in intrastate rates and fares which cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commece. Implementation of the increases sought by Greyhound will remove this unreasonable discrimination and burden.

It is ordered:

The motion to dismiss the petition is denied.

The relief sought in the petition is granted. Greyhound is authorized to put into effect the increases in Alabama intrastate passenger fares proposed in Docket No. 18911 filed with the Alabama Public Service commisison on October 14, 1983.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Chairman Taylor concurred.

James H. Bayne

(SEAL) Secretary

INTERSTATE COMMERCE COMMISSION

No. MC-C-10901

PETITION OF GREYHOUND LINES, INC.,
FOR REVIEW OF A DECISION OF THE
WEST VIRGINIA PUBLIC SERVICE COMMISSION
PURSUANT TO 49 U.S.C. 11501

Decided: April 13, 1984

Petitioner granted relief from a decision of the West Virginia Public Service Commission (WVPSC). The WVPSC decision denied petitioner's request for a rate increase for the intrastate transportation of passengers and newspapers.

Anthony P. Carr and Lat J. Clemins for petitioner.

Robert R. Rodecker and S. Thornton Cooper for WVPSC.

DECISION

BY THE COMMISSION:

By petition filed February 13, 1984, Greyhound Lines, Inc., (Greyhound or petitioner) seeks review pursuant to 49 U.S.C. 11501(e) of a decision of the West Virginia Public Service Commission (WVPSC) which denied petitioner's application to increase its intrastate passenger fares and newspaper rates. Greyhound asserts that the existing West

Virginia intrastate rates impose an unreasonable burden on interstate commerce and requests this Commission to prescribe rates for the involved intrastate service at the level sought before the WVPSC. WVPSC has responded to the petition, and Greyhound filed a rebuttal statement.

The petition is filed under Section 17 of the Bus Regulatory Reform Act of 1982 (Bus Act), Pub. L. 97-261, 96 Stat. 1102, codified at 49 U.S.C. 11501(e). Section 17 permits an interstate motor common carrier of passengers to seek this Commission's review of: (1) a State decision resulting in intrastate rates, rules, or practices which unreasonably discriminate against, or impose an unreasonable burden on, interstate or foreign commerce; or (2) a State's failure to act within 120 days of a carrier's request for permission to establish a rate, rule or practice. Regulations implementing this new law were adopted

in Ex Parte No. MC-160, Procedures for Review of Intrastate Bus Rates, 133 M.C.C. 10 (1982), and are codified at 49 CFR 1143.

BACKGROUND

On September 27, 1983, Greyhound filed an application with the WVPSC seeking to increase intrastate passenger fares an average of 14.8 percent over existing fares. Fares on individual routes would be increased by percentages ranging from 0.0 percent (Ansted to Big Creek) to 34.1 percent (Gauley Bridge to Mt. Hope), in each case equalizing the fares to comparable interstate fares. In addition, Greyhound proposed to increase rates for the intrastate transportation of newspapers by approximately 25 percent, or to the same level as the interstate rates for such shipments. Finally, Greyhound seeks to eliminate the multi-ride discount on intrastate fares, since there are no such discounts on interstate fares, thereby equalizing such fares.

According to Greyhound's projections, the entire Greyhound System (East) should have an operating ratio of 95.82 for the twelve months ending April 30, 1984, based on adjustments to the figures for the twelve months ending April 30, 1984. Greyhound projects an operating ratio of 107.41 for the 12 months ending April 30, 1984, for its combined intrastate and interstate West Virginia operations. Greyhound's projected West Virginia intrastate figure for that same period is an operating ratio of 94.43.

Greyhound noted the disparity between current intrastate rates and the rates for comparable interstate service. Its comparison of representative interstate and intrastate passenger fares between selected city pairs shows that intrastate fares would have to be increased by varying amounts from zero to 34.1 percent (averaging 14.9 percent) to equal comparable interstate passenger fares. Simi-

larly, the multi-ride intrastate discount would need to be eliminated, since no such discount applies to interstate fares. Finally, newspaper rates would have to be increased by 25 percent to equal comparable interstate rates.

A hearing was held before the WVPSC on December 12, 1983. WVPSC issued a final decision denying the proposed increase on Janaury 26, 1984. WVPSC noted that Greyhound's West Virginia intrastate operating ratio (94.43) is lower than its overall West Virginia operating ratio (107.41), and therefore concluded that because Greyhound's intrastate operations are more profitable, intrastate operations are not being subsidized by interstate operations.

In its petition for review of the State decision, Greyhound invokes the presumption set forth at 49 U.S.C. 11501(e)(2)(A)(i). Specifically, Greyhound claims that because its West Virginia intrastate rates are lower

than its rates for comparable interstate transportation of passenges and newspapers between the same points, a rebuttable presumption is created that such intrastate rates impose an unreasonable burden on interstate commerce.

Greyhound contends that, at the time of its request, there was a disparity between its intrastate and interstate passenger and newspaper rates for comparable service on a statewide basis, and that even with approval of the sought intrastate increases, its intrastate rates would merely equal its interstate rates. Greyhound further argues that subsidization of intrastate passenger fares by interstate passengers traveling between the same points creates an unreasonable burden on interstate commerce.

In response to the petition, WVPSC contends that where the sole issue is the disparity of rates between intrastate and interstate service, once it has been established that the overall operations of Grey-

hound in West Virginia are profitable and that the intrastate operations of Greyhound are more profitable than the interstate operations, the presumption of 49 U.S.C. 11501(e)(2)(A)(i) has been rebutted. The carrier then has the burden of establishing that the lower intrastate rates create a burden on interstate commerce and that such burden is unreasonable.

In rebuttal, Greyhound questions WVPSC's method of calculating petitioner's projected intrastate operating ratio. Regardless, it asserts that evidence regarding operating ratios is insufficient to rebut the presumption set forth in subsection 11501(e)(2)(A)-(i).

DISCUSSION AND CONCLUSIONS

Upon full consideration of the record and of the pleadings filed in this proceeding, we conclude that the denial by the WVPSC of Greyhound's proposed increases results in intrastate rates which cause unreasonable dis-

crimination against, and impose an unreasonable burden upon, interstate commerce. Accordingly, we approve the increases in intrastate passenger fares and newspaper rates sought by Greyhound.

Subsection 11501(e)(2)(A)(i) establishes a rebuttable presumption that a prescribed rate, rule, or practice applicable to intrastate transportation of passengers unreasonably burdens interstate commerce if it results in the carrier charging an intrastate rate which is lower than the rate applicable to comparable interstate service. The record clearly establishes that Greyhound's present intrastate passenger fares and newspaper rates are lower than comparable interstate rates and that, at the proposed level, they would merely equal comparable interstate rates. The record does not reveal any differences in operating conditions, services, or costs between intrastate and interstate operations which would

justify the disparity in applicable fares and rebut the statutory presumption. This continued rate discrepancy results in subsidization of West Virginia intrastate operations by interstate operations, representing an excessive and undue burden on interstate commerce.

WVPSC argues that Greyhound's West Virginia intrastate operations are more profitable than its interstate operations, and thus that the lower intrastate rates do not burden interstate commerce. WVPSC bases this argument on calculations which show a West Virginia intrastate operating ratio of 94.43 versus a West Virginia state (combined interstate and intrastate) operating ratio of 107.4 for the "going level" year. We do not accept these calculations as sufficiently reliable to rebut the statutory presumption, for the reasons explained below.

The calculation of intrastate versus combined operating ratios involves a number of highly arbitrary accounting assumptions for allocating the revenues and especially the expenses between interstate and intrastate service. The essence of the problem is that both types of service are provided simultaneously on the same bus and by the same personnel; a given bus typically contains both interstate and intrastate passengers. There is no non-arbitrary method of allocating the common costs of providing these two types of service. In this case, WVPSC relies on calculations made by Greyhound according to WVPSC rules. Greyhound allocated expenses in proportion to the number of passenger miles of each type of service. Thus, because 27.68 percent of the passenger miles were generated by intrastate passengers, 27.68 percent of the expenses were allocated to intrastate service. This is the customary method used to allocate

expenses, and it normally produces a reasonable result.

In this case, however, this allocation method produces an economically absurd and unreasonable result. Intrastate rates, which are significantly below interstate levels, are shown as apparently more profitable than interstate rates. And yet the combined operating ratio shows a significant loss. Thus, the lower rates appear to be more profitable than the higher rates on the same buses. The appearance is deceptive and a result of the arbitrary, albeit traditional, method of allocating common costs between the two types of service.

The principal root of this error is that typically intrastate passenger trips are significantly shorter than interstate trips. It is well known that the costs of transportation by bus and by virtually every other mode are not directly proportional to length of haul,

but that costs per mile for short trips are typically much higher than for long trips. This reflects the influence of costs of ticketing, baggage handling, other station expenses, and other expenses which do not vary significantly (or at least not proportionally) with the length of the trip. This in turn is reflected in the rate structure for bus and virtually all other forms of transportation: rates or fares per mile are typically much higher for short trips than for long trips. The higher short haul rates or fares per mile reflect the fact that short haul costs per mile are significantly higher.

We have recognized in previous cases under the Bus Act that this "taper" of costs and fares per mile must be considered. For example, in No. MC-C-10891, Petition of Trailways Lines, Inc., et al., For Review of a Decision of the Railroad Commission of Texas Pursuant to 49 U.S.C. 11501, served January

31, 1984, objectors argued that intrastate revenues were higher than interstate revenues per mile; but failed to recognize the substantial differences in length of haul. We said there (at 6) that comparisons of revenue per mile do not determine relative profitability (of intrastate versus interstate service) absent a similar comparison of costs per mile. In No. MC-C-10893, Petition of Greyhound Lines, Inc., For Review of a Decision of the Railroad Commission of Texas Pursuant to 49 U.S.C. 11501, served February 21, 1984, objectors made the same argument that intrastate revenues per passenger mile were higher than interstate levels, comparing intrastate trips with interstate trips of much greater average length. We said (at 5) "We do not consider this to be 'comparable transportation' within the meaning of the statute, particularly as it is well known that costs per passenger mile decline significantly with trip length."

In this case, the sharp difference in length of haul is reflected in the fact that intrastate revenue per passenger mile is approximately $0.1206, in contrast to interstate revenue per passenger mile of approximately $0.1073.1/ This is despite the fact that intrastate rates are an (unweighted) average of 14.8 percent lower than the corresponding interstate rates. Yet the cost allocation procedure used to produce the intrastate operating ratio assumes that intrastate passenger miles are no more costly to produce than (that is, have the same characteristics as) interstate passenger miles. This is the source of the anomalous result that lower fares appear to be contributing more than higher fares on the same bus.

1/ Derived from Greyhound's Exhibit No. 3 and Exhibit No. 5 before WVPSC.

Although there is no entirely non-arbitrary method of allocating common costs between two services produced simultaneously, some methods may be more reasonable than others. In this case, because short haul trips are much more costly (per mile) to produce than longer haul trips, and because the fare structure reflects this difference in cost per mile (although perhaps not perfectly), an allocation of expenses in proportion to revenue would arguably be more reasonable, or less arbitrary, than the allocation in proportion to passenger miles on which WVPSC relies. The underlying problem here is that the distinction between intrastate and interstate service on the same bus at the same time is highly artificial. Thus, any attempt to calculate an intrastate operating ratio on mixed operations is unavoidably a meaningless exercise.

For example, if we were to allocate expenses in proportion to revenues rather than in proportion to passenger miles, on the grounds that such an allocation is more likely to reflect actual cost patterns, the apparently lower intrastate operating ratio would disappear. Both the intrastate and interstate operating ratios would be approximately equal to 107.4.2/ This result would cure the offense

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2/ In fact, arguably, expenses could more reasonably be allocated in proportion to the revenues which would have been earned if the intrastate fares had been equal to interstate levels. This would reflect the likelihood that interstate fare patterns more accurately reflect differences among routes than the intrastate rates which have been artificially suppressed in many cases through discriminatory state regulatory rules, as recognized by Congress in the passage of the Bus Act. Such an alternative allocation would show a much higher operating ratio for intrastate service than for interstate service. This may be a more accurate reflection of the reality. Such an allocation would be at least as reasonable as either of the two alternatives described above.

against common sense which otherwise results from the traditional, but highly artificial, distinctions and arbitrary accounting procedures used to produce the operating ratio of which WVPSC relies.

Thus we find that WVPSC has not shown that intrastate rates are subsidizing interstate service, and that WVPSC has not successfully rebutted the presumption that the rate disparity imposed an unreasonable burden on interstate commerce.

Accordingly, Greyhound's showing that its intrastate rates are lower than comparable interstate rates, and thus burdensome to interstate commerce, stands unrebutted. We, therefore, will prescribe the sought intrastate passenger fare and newspaper rate increases of 14.8 percent and 25 percent, respectively, as well as elimination of the intrastate multi-ride discount.

Other arguments raised by the parties are not relevant to our determination here and will not be discussed.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

We find:

The WVPSC decision of January 26, 1984, results in intrastate rates and fares which cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commerce. Implementation of the increases sought by Greyhound will remove this unreasonable discrimination and burden.

It is ordered:

Greyhound is authorized to put into effect the increase in West Virginia intrastate rates proposed to the WVPSC in M.C. case No. 21997.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Chairman Taylor concurred. Commissioner Gradison did not participate.

James H. Bayne

(SEAL) Acting Secretary

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Office • Supreme Court, U.S.
FILED
JUN 7 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1617

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
AND GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF GREYHOUND LINES, INC., RESPONDENT

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GREYHOUND LINES, INC.

June 1985

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's decision, affirmed by the Court of Appeals, authorizing an increase in intrastate Alabama bus rates is arbitrary or capricious where that Federal agency, acting pursuant to the provisions of the Bus Regulatory Reform Act of 1982, has found that Petitioner failed to rebut a statutory presumption that intrastate bus rates lower than interstate rates unreasonably burden interstate commerce.

2. Whether 49 U.S.C. §11501(e)(5) which preempts all state laws, rules, regulations, standards, or other provisions regarding implementation of bus rate reductions preempts state tariff filing requirements for such rate reductions.

STATEMENT REQUIRED BY RULE 28.1

Respondent, Greyhound Lines, Inc., is a wholly-owned subsidiary of The Greyhound Corporation. A list of the principal subsidiaries of The Greyhound Corporation and the subsidiaries and affiliates of Greyhound Lines, Inc. appears in Appendix A.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-1617

ALABAMA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
AND GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF GREYHOUND LINES, INC., RESPONDENT

OPINIONS BELOW

The judgment of the Eleventh Circuit Court of Appeals affirmed without written opinion a decision of the Interstate Commerce Commission ("ICC"). (Pet. App. 1a). The ICC's decision is unreported. (Pet. App. 2a-14a).

JURISDICTION

The Circuit Court's judgment was entered on February 22, 1985. Petitioner timely filed its Petition For Writ of Certiorari with this Court on April 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF CASE

On October 14, 1983, Respondent, Greyhound Lines, Inc. ("Greyhound"), pursuant to the provisions of the Bus Regulatory Reform Act of 1982 ("Bus Act"), Pub. L. No. 97-261, 96 Stat. 1102 (codified in part at 49 U.S.C. §11501(e)(2)(A)(i)), requested a passenger fare increase from the Alabama Public Service Commission ("APSC" or "Petitioner") in Greyhound's low Alabama intrastate fares. APSC conducted an oral hearing on December 14, 1984. At the State hearing, Greyhound produced conclusive evidence that its intrastate fares in Alabama were less than its interstate fares for comparable transportation. (Pet. 7, 8).

Despite lower Alabama intrastate fares, APSC denied Greyhound's proposed increase, principally, for the stated reason that the lower intrastate fares result in an Alabama intrastate operating ratio which is lower than the interstate ratio. [1] Stated in another way, APSC concluded that the lower fares produced more profitable operations. APSC, therefore, denied the requested fare increase. (Pet. 7). Thereafter, on March 20, 1984, Greyhound, pursuant to the preemption provisions of Section 17 of the Bus Act (49 U.S.C. §11501(e)), requested the ICC to prescribe Alabama intrastate rates.

The ICC, after considering all the arguments and evidence of the parties, rejected APSC's arguments and approved Greyhound's requested increase in Alabama intrastate rates.

Before the ICC, Greyhound invoked one of the presumptions of the Bus Act (49 U.S.C. §11501(e)(2)(A)(i)). This provision presumes a burden on interstate commerce

[1] An "operating ratio" indicates the relationship in percent of operating expenses to revenues. *Central Territory General Increases*, 49 M.C.C. 4, 10 n. 6 (1948). Accordingly, if the carrier is operating at a loss, expenses exceed revenues and the operating ratio is in excess of 100 percent. Conversely, if the carrier's operations are profitable, expenses are less than revenues and the operating ratio is less than 100 percent. In short, under this definition, the lower the operating ratio, the more profitable the carrier; and the higher the operating ratio, the more unprofitable the carrier.

when intrastate rates are lower than interstate rates for comparable transportation. Once a bus company establishes that its intrastate rates are lower than its interstate rates (as Greyhound did in this case) this presumption shifts the burden of proof to APSC, as an objector, to demonstrate that the intrastate-interstate rate disparity does not burden interstate commerce. Before the ICC, Petitioner conceded that intrastate rates, even after the proposed increase, would be lower than interstate rates (Pet. App. 9a, 11a and 12a) but argued that it had rebutted the statutory presumption because: (1) Greyhound's Alabama intrastate operating ratio, determined under Alabama's pre-Bus Act procedures, indicated that Greyhound was purportedly profitable; and (2) Greyhound's rate increase was not needed because Greyhound, for competitive reasons, had implemented certain short-term rate reductions.

After full consideration of the record, pleadings, and evidence of the parties, the ICC rejected each of Petitioner's agruments. The ICC found that the "record clearly establishes that Greyhound's intrastate passenger fares, even at the proposed level, are significantly lower than comparable interstate fares." (Pet. App. 11a). Indeed, the ICC found that the disparity between intrastate and interstate rates was unrebutted and that this disparity imposed unreasonable burdens on interstate commerce. (Pet. App. 12a). The ICC also found that Petitioner had not shown any differences in operating conditions, services, or costs between intrastate and interstate operations to justify the disparity in applicable rates which could rebut the statutory presumption. (*Id.* 11a) Finally, the ICC found that reliance on intrastate versus interstate operating ratios on mixed operations involved arbitrary accounting assumptions and that these operating ratio calculations are not sufficiently reliable to rebut the statutory presumption raised by the rate disparity. (*Id.*). Accordingly, the ICC prescribed the requested rate increase. (*Id.* 13a).

APSC appealed the ICC's decision to the Eleventh Circuit Court of Appeals, and the Eleventh Circuit unanimously affirmed the decision of the Federal agency without written opinion. APSC now petitions this Court for a Writ of Certiorari.

BACKGROUND

The Bus Act created a new and comprehensive Federal/State scheme to regulate bus companies in order to "eliminate outdated and cumbersome regulation, thereby allowing greater flexibility of service and increased competition." S. Rep. No. 97-411, 97th Cong., 2d Sess. 1 (1982). Congress emphasized that the pre-Bus Act Federal/State structure had tended to impair bus service and diminish price and service competition. H.R. Conf. Rep. No. 97-780, 97th Cong., 2d Sess. 32 (1982) ("Conference Report"). Congress expressed particular concern that State regulation of bus companies in and of itself is "one of several significant factors contributing to this [the bus industry's] inadequate performance." State actions in the areas of entry, exit, service frequency and rates "often have significant adverse impacts on intercity bus operations" and *"impose an unreasonable burden on interstate commerce and must be preempted."* (S. Rep. No. 97-411, *supra*, at 7, 8.).

Under the Bus Act's new regulatory scheme, the respective roles of Federal and State governments have been fundamentally altered and State regulation has been

preempted in virtually every area of a bus company's service. [2]

To remedy precisely the type of inequitable and discriminatory rate disparity presented in this case, Congress through Section 17 of the Bus Act (49 U.S.C. §11501(e)) created "a mechanism to remedy situations where State actions are creating an unreasonable burden on interstate commerce." Conference Report, *supra, at* 51. That section details the procedures for preempting State rates, rules, and practices.

The ICC is vested with jurisdiction if the State has denied or delayed for more than 120 days the carrier's request for a change of rates, rules, or practices. Thereupon, the ICC is empowered to prescribe the rate, rule, or practice and to preempt the State action if the ICC "finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." (49 U.S.C. §11501(e)(1)(B)). By its very terms, this section establishes the conditions under which discriminations against and burdens on interstate commerce arise. Subsection (2)(A) sets forth three separate, independent conditions which establish a statutory presumption that a State's rate, rule, or practice unreasonably burdens interstate commerce. Subsection (2)(B) establishes a fourth and separate condition relating solely to intrastate rates and when

[2] In the area of entry, the Bus Act authorizes the ICC to issue intrastate regular-route certificates under the Bus Act's liberalized entry standards (49 U.S.C. §10922(c)(2)(A) and (B)) to completely bypass the States' operating rights certification process. So too, States are totally preempted from regulating intrastate service reductions, schedule changes and discontinuance of service for §10922(c)(4) operating rights (49 U.S.C. §11501(e)(5) and 49 U.S.C. §10935(h)). In the important area of small package property services, all State laws and regulations relating to pick-up and delivery of package express are totally preempted (49 U.S.C. §10922(c)(2)(C)). Bus companies can exit intrastate service, and the ICC preempts State actions under a mechanism which parallels the Section 17 rate preemption provisions (49 U.S.C. §10935).

such rates are presumed to be a burden on interstate commerce. *Commissioner of Transportation of N.Y. v. U.S.*, 750 F.2d 163, 169 (2d Cir. 1984), cert. denied, 105 S.Ct. 2019 (April 15, 1985).

At issue in this proceeding is the presumption under 49 U.S.C. §11501(e)(2)(A)(i) that Alabama's rates, rules, or practices unreasonably burden interstate commerce because they result in Greyhound charging a lower rate for intrastate transportation than for comparable interstate transportation. [3]

Upon Greyhound's invocation of this presumption, there is a Congressionally presumed burden on interstate commerce, and it is incumbent upon Petitioner, as the objecting party, to show that the rate disparity is justified and does not discriminate against and burden interstate commerce. An objector can meet its burden of proof and rebut the statutory presumption by demonstrating differences in operating conditions, services, or costs between the intrastate and interstate operations sufficient to justify the rate disparity. *In re Petition of Greyhound Lines, Inc., For Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. §11501* (decided April 13, 1984) (not printed). (Pet. App. 22a, 23a). *Aff'd sub nom. Public Service Commission of West Virginia v. ICC,*

[3] The two other subsection (2)(A) conditions which give rise to the presumptions are: (i) "that as a result of such rate, rule, or practice, such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation;" or (ii) the appropriate State authority has "failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request."
Under the fourth separate condition of subsection (2)(B) the presumptions arise if the ICC "finds that the most recent general rate increase applicable to the transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation . . ."

749 F.2d 32 (4th Cir. 1984). (Decision without published opinion).

REASONS FOR DENYING THE WRIT

This case presents narrow issues reasonably decided by the ICC and the Court of Appeals without dissent and without conflicting opinion from any other Circuit. There are no special or important reasons for granting the Petition for Writ of Certiorari.

To date, three other Circuits have rendered opinions in Section 17 cases. All three Circuit Courts have affirmed the ICC's interpretation of that section. *West Virginia v. ICC, supra; Commissioner of Transp. of N.Y. v. U.S., supra; State of Texas v. United States,* _____ F.2d _____ (5th Cir. May 28, 1985).[4] The complete consistency of interpretation among the Circuits, without conflict or dissent, further confirms that this case presents no issue deserving of review by this Court.

Denial of the Petition for Writ of Certiorari is made easy when Petitioner's arguments are put in focus. In the Court of Appeals below and in its Petition, APSC concedes that Congress through the specific provisions of the Bus Act expressly intended to, and did, selectively preempt areas of State regulation. Petitioner further concedes that Congress authorized the ICC to prescribe intrastate bus rates. (Pet. 10-12). Denial of APSC's Petition is also made easy when consideration is given to the issues which Petitioner does not contest or has abandoned.

Petitioner alludes to, but does not contest, the power of Congress to authorize the ICC to preempt intrastate bus rates. Petitioner does not contest the validity of the Bus Act nor the rate preemption provisions of Section 17. Petitioner does not contest the validity of the statutory presumptions under which intrastate rates, rules, and practices are deemed

[4] Remanded to the ICC on other grounds in order for the ICC to consider excursion fares offered by the carriers under the facts of that case.

to burden interstate commerce. Finally, Petitioner does not contest that once lower intrastate bus rates are established, the burden of proof shifts to the objector to rebut the presumption that such rates burden interstate commerce.

While conceding that the Bus Act explicitly preempts State rates, rules, and practices, Petitioner inexplicably raises an undeveloped argument regarding concepts of Federalism. Significantly, Petitioner agrees that where, as here, Congress has clearly articulated the justification for the exercise of Federal power (preemption provisions of Section 17) and such exercise is made "definitely and clearly apparent," the principles of Federalism are satisfied. (Pet. 13, 14). That Congress has such power is beyond serious argument. *Hodel v. Virginia Surface Mining and Recl. Assn.*, 452 U.S. 264, 277 (1981).

The decisions cited by Petitioner construe materially different statutory schemes than that now presented to this Court. Petitioner's decisions relate primarily to railroad rates and, consequently, are totally inapplicable here. These decisions relate to an earlier Section 13(4) (formerly 49 U.S.C. §13(4) concerning railroad rates). Under that statutory scheme then applicable to railroads, the burden of proof rested with the rail carrier to show the burdening of interstate commerce. Under the Bus Act, the opposite is true. Once the ICC asserts jurisdiction, the burden of proof is on the objector. Where the carrier, as here, has established that its intrastate rates are lower than interstate rates for comparable transportation, Petitioner has the burden to rebut that presumption with substantial evidence. This APSC failed to do.

Petitioner raises general notions of Federalism relying principally on *North Carolina v. U.S.* 325 U.S. 507 (1945), and argues that there must be "a high standard" and "clear justification" for exercise of Federal power. (Pet. 15). The question in *North Carolina* was whether the ICC had made the necessary findings, with sufficient clarity under the former Section 13(4), in order for it to preempt State authority

over intrastate rail rates. Under the Bus Act, however, Congress itself preempted State authority over intrastate rates and entrusted the ICC with the power to prescribe intrastate rates within the established substantive legal criteria. Congress itself identified conditions where burdening of interstate commerce is presumed. The Second Circuit Court faced with arguments identical to those presented here passed on this precise question and concluded that under the Bus Act "Congress made a decision to allow substantial preemption of state regulatory authority" and, therefore, the "rigid requirements of *North Carolina v. U.S.* do not apply to the Commission's decisions made pursuant to the Bus Act." *Commissioner of Transp. of N.Y. v. U.S., supra,* at 169. The Second Circuit case was also subject to a Petition for Writ of Certiorari which this Court denied. Moreover, statutory enactments amending Section 13(4) subsequent to the cases relied upon by Petitioner raise serious questions whether *North Carolina* and its progeny are even applicable to rail rates. See The Staggers Rail Act of 1980, 49 U.S.C. §11501(b)-(d). Taken collectively, the fundamental principles of Federalism which Petitioner raises are fully satisfied by the Bus Act's statutory scheme and the determinations below.

Petitioner relies on an operating ratio analysis which compares intrastate and interstate operations in a combined service, and argues that it thereby meets its burden of proof under 49 U.S.C. §11501(e)(2)(A)(i). Petitioner's operating ratio arguments for combined intrastate-interstate service have been repeatedly rejected by the ICC in numerous consistent decisions because they involve "highly arbitrary accounting assumptions", "lead to absurd and unreasonable result(s)" and are unreliable. *In re West Virginia, supra,* (Pet. App. 23a-25a). The Eleventh Circuit in this case and two other Circuit Courts have likewise rejected operating ratio arguments and operating ratios themselves as lacking sufficient reliability to constitute probative evidence sufficient to rebut the Bus Act's statutory presumptions.

West Virginia v I[illegible], supra; and *Commissioner of Transp. N.Y. v. U.S., supra, at 170.*

These Circuit Court decisions confirm the unreliability of intrastate-interstate operating ratio comparisons for combined intrastate and interstate service and the lack of probative value of such evidence.

Petitioner further raises an issue regarding the preemptive scope of 49 U.S.C. §11501(e)(5). That subsection is as broad as any Federal statutory preemption provision:

> "No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law ... relating to the implementation of any reduction in the rates for such [interstate or intrastate] transportation ..."

That provision is clear on its face and explicitly preempts State actions relating to rate reductions by bus companies. In view of the express and plain meaning of this provision, no interpretative review by this Court is warranted.

CONCLUSION

Petitioner's arguments present narrow issues which do not merit the attention of this Court. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,
ORIGINAL SIGNED BY
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No. 84-1617

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
AND GREYHOUND LINES, INC.,

Respondents.

CERTIFICATE OF SERVICE BY MAIL

Lat J. Celmins, being a member of the bar of this Court, hereby certifies that:

1. He is counsel of record for Greyhound Lines, Inc., one of the Respondents herein.

2. Three copies of the attached Brief in Opposition of Greyhound Lines, Inc., Respondent, have been served upon each counsel for the parties, in accordance with the provisions of Rule 28 of this Court, by placing the same in the United States Express Mail, postage prepaid, properly addressed to:

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Montgomery, Alabama 36104

Solicitor General
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9th and 10th Streets, N.W.
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3. All parties required to be served have been served.

DATED: June 5, 1985

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APPENDIX A

APPENDIX A

LIST OF PRINCIPAL SUBSIDIARIES OF THE GREYHOUND CORPORATION (ARIZONA) AND SUBSIDIARIES AND AFFILIATES OF GREYHOUND LINES, INC. (CALIFORNIA)

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province, or country of incorporation and ownership percentage are shown in parentheses following each name. Where no ownership percentage appears, the ownership interest is 100 per cent. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. The list does not include companies in which the direct or indirect interest of The Greyhound Corporation is less than 20 percent.

THE GREYHOUND CORPORATION (ARIZONA) (PARENT)

TRANSPORTATION GROUP:

GREYHOUND LINES, INC. (California)
- Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
- Greyhound Lines of Canada Ltd. (Canada) (68%)
- Motor Coach Industries Limited (Manitoba) (68%)
- Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
- Jefferson Lines Holding Company (Minnesota) (40%)
- Kerrville Bus Company, Inc. (Texas) (40%)
- Southeastern Stages, Inc. (Georgia) (40%)
- Springfield Bus Terminal Corporation (Massachusetts) (32%)
- Union Bus Station of Oklahoma City, Oklahoma (Oklahoma) (20%)
- Wilmington Union Bus Station Corporation (North Carolina) (25%)

Texas, New Mexico & Oklahoma Coaches, Inc. (Texas) (98%)

Motor Coach Industries is a part of the Transportation Manufacturing Group but is a subsidiary of Greyhound Lines, Inc.

AFFILIATES

TRANSPORTATION MANUFACTURING GROUP:

Motor Coach Industries, Inc. (Delaware)
Transportation Manufacturing Corporation (Delaware)
Universal Coach Parts, Inc. (Delaware)

CONSUMER PRODUCTS GROUP:

Armour-Dial, Inc. (Delaware)
  Armour Handcrafts, Inc. (Arizona)
  Armour International Company (Arizona)
Purex Corporation (Delaware)

FINANCIAL GROUP:

Greyhound Capital Corporation (New York)
Greyhound Financial & Leasing Corporation AG
  (Switzerland)
Greyhound Leasing & Financial Corporation (Delaware)
Greyhound Realty Corporation (Arizona)
MCI Acceptance Corp. (Delaware)
Verex Corporation (Arizona)

SERVICES AND FOOD SERVICE GROUP:

Aircraft Service International, Inc. (Delaware)
Consultants & Designers Inc. (Delaware)
Dispatch Services, Inc. (Florida)
Faber Enterprises, Inc. (Delaware)
Florida Export Tobacco Co. Inc. (Florida)
Greyhound Exhibitgroup Inc. (Delaware)
Greyhound Exposition Services, Inc. (Nevada)
Greyhound Food Management, Inc. (Michigan)
  Glacier Park, Inc. (Arizona) (80%)
  Restaura, S.A. (Belgium)
Greyhound Support Services, Inc. (Delaware)
Post Houses, Inc. (Delaware)
Premier Cruise Lines, Ltd. (Cayman Islands)
Travelers Express Company, Inc. (Minnesota)

(5)

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CLERK

No. 84-1617

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission's decision permitting Greyhound to increase its intrastate bus rates in Alabama was authorized by the Bus Regulatory Reform Act of 1982.

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ALABAMA PUBLIC SERVICE COMMISSION, PETITIONER

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a) is reported at 756 F.2d 883 (Table). The decision of the Interstate Commerce Commission (ICC) (Pet. App. 2a-14a) and the underlying decision of the Alabama Public Service Commission are unreported. A subsequent decision of the ICC, denying the Alabama Public Service Commission's request for an administrative stay of the ICC's first decision pending review in the court of appeals, is unreported (App., *infra*, 1a-9a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on February 22, 1985. The petition for a writ of certiorari was filed on April 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Bus Regulatory Reform Act of 1982 (Bus Act), 49 U.S.C. 11501(e), Congress authorized the Interstate Commerce Commission to preempt state regulation of certain intrastate rate proposals of interstate bus carriers.[1] Congress found that state regulation had contributed to the financially weak condition of the bus industry in recent years. S. Rep. 97-411, 97th Cong., 2d Sess. 7-8 (1982); H.R. Rep. 97-334, 97th Cong., 1st Sess. 24 (1981). It was noted that "a large number of * * * intrastate routes * * * are cross-subsidized by more profitable interstate routes and charter operations" and that "the carrier who must cross-subsidize its intrastate route is unfairly charging its interstate travelers an inequitable price." H.R. Rep. 97-334, *supra,* at 25; see *id.* at 44; S. Rep. 97-411, *supra,* at 8-11. The Senate Report on the Bus Act also observed (*id.* at 7-8):

> An individual bus moving in interstate commerce will often pick up and carry passengers who are strictly intrastate. Thus, that vehicle is regulated by both Federal and State authorities at the same time. State regulatory restrictions on entry, exit, and/or service frequency, and slow action by State regulatory commissions on fare increases, often have significant adverse impacts on intercity bus operations. Thus, these actions impose an unreasonable burden on interstate commerce and must be preempted.

Accordingly, Congress enacted 49 U.S.C. 11501(e) to "create[] a mechanism to remedy situations where State actions are creating an unreasonable burden on interstate

---

[1]States retain full authority over the rates of bus carriers owned or controlled by a state or local government and over the rates of solely intrastate carriers. Until the Bus Act was enacted, states had full authority to regulate the intrastate rates of interstate carriers as well.

commerce." H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. 52 (1982). See also S. Rep. 97-411, *supra,* at 5, 28. That Section limits state authority to review the intrastate rate proposals on interstate carriers to a 120-day period. The ICC obtains jurisdiction (49 U.S.C. 11501(e)(1)(A)):

> if * * * the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request * * *.

The provision directly at issue in this case, 49 U.S.C. 11501(e)(2)(A)(i), creates a rebuttable presumption that an intrastate bus fare imposes an unreasonable burden on interstate commerce if the ICC finds that the intrastate fare is lower than the interstate fare for comparable interstate transportation.[2] Once the carrier establishes that its intrastate fares are lower than its interstate fares for comparable transportation,[3] the burden shifts to the state or other objecting party to show that the disparity is justified. An objector may rebut the statutory presumption by demonstrating differences in operating conditions, services, or

---

[2]Under Section 11501(e), a rebuttable presumption of an unreasonable burden on interstate commerce is also established by an ICC finding that (1) a carrier's revenues from the intrastate fares are less than the variable costs of providing the service, (2) the state agency failed to act on the intrastate fare request by the 120th day, or (3) the most recent intrastate general fare increase is less than the most recent general fare increase applicable to interstate traffic.

[3]Transportation may be "comparable" for purposes of the presumption not only when it involves an interstate trip of similar length to the intrastate one whose fare is at issue, but also—as here (Pet. 7)—when both trips are between the same points within the state, and the passenger who purchases the service as part of an interstate trip is charged a higher fare than the passenger, travelling on the same bus between the same points, who purchases a ticket for a purely intrastate trip. See, *e.g.,* S. Rep. 97-411, *supra,* at 9-10, setting forth specific examples where a carrier's intrastate fares were substantially (30%-40%) below the published interstate fares between the same two points.

costs between the inter- and intrastate operations sufficient to justify the disparity. *E.g.*, Pet. App. 11a, 22a-23a; App., *infra*, 7a; and *In re Greyhound Lines, Inc.*, No. MC-C-10885 (ICC Dec. 8, 1983), aff'd *sub nom. Commissioner of Transportation* v. *United States*, 750 F.2d 163, 170 (2d Cir. 1984), cert. denied, No. 84-1135 (Apr. 15, 1985). If the presumption that the lower intrastate fares burden interstate commerce is not rebutted, the ICC "shall prescribe any rate" for the intrastate transportation. 49 U.S.C. 11501(e)(1).

2. In October 1983 Greyhound Lines, Inc. (Greyhound) filed an application with the Alabama Public Service Commission (APSC) for a 20% increase in its Alabama intrastate fares. Greyhound presented evidence showing that its then existing intrastate fares ranged from 30% to 37% below the fares for the same interstate transportation between selected points in Alabama, and that with the proposed 20% increase the intrastate fares would still be 10% to 12% below the interstate fares (Pet. App. 7a-9a). Based upon that evidence, Greyhound sought to invoke the presumption under the Bus Act that intrastate fare levels that are less than comparable interstate fares unreasonably burden interstate commerce (*ibid.*).

The APSC denied the proposed increase in its entirety (Pet. App. 5a). In reaching its decision, the APSC relied on certain statistical evidence in the form of operating ratios (expenses expressed as a percentage of revenues) that purported to demonstrate that the lower intrastate fares were more profitable than the higher interstate fares (see Pet. 7; Pet. App. 8a). In addition, the APSC found that Greyhound had failed to follow Alabama law with respect to publication of tariffs on the fare reductions (*id.* at 6a).

Greyhound appealed the APSC decision to the ICC, again urging that the evidence established the presumption of a burden on interstate commerce and asking the ICC to prescribe the intrastate rates by permitting Greyhound to implement the proposed 20% increase (Pet. App. 2a-3a, 7a).

3. On May 16, 1984 (Pet. App. 2a-14a), the ICC granted Greyhound's petition and authorized the 20% increase on intrastate fares. The ICC found (*id.* at 11a) that the record "clearly establishe[d] that Greyhound's intrastate passenger fares, even at the proposed level, was significantly lower than comparable interstate fares." The issue was then whether Alabama had rebutted the statutory presumption (49 U.S.C. 11501(e)(2)(A)(i)) and the ICC found that it had not (Pet. App. 11a):

> Protestant has not shown any differences in operating conditions, services, or costs between intrastate and interstate operations that would justify the disparity in applicable fares and rebut the statutory presumption.

With respect to the operating ratio comparisons relied upon by the APSC to demonstrate that the lower intrastate rates were actually more profitable than the interstate rates, the ICC rejected the evidence as insufficiently reliable to rebut the statutory presumption. Pet. App. 11a-12a, 15a-33a, citing *In re Greyhound Lines, Inc.*, No. MC-C- 10901 (ICC Apr. 13, 1984), aff'd *sub nom. Public Service Commission* v. *ICC*, 749 F.2d 32 (4th Cir. 1984) (Table). Subsequently, in denying the APSC's petition for an administrative stay pending judicial review, the ICC elaborated on its reasons for rejecting the evidence (App., *infra*, 7a):

> In this proceeding, the operating ratio calculations relied upon by the APSC allocated costs strictly on the basis of passenger miles. Since 22 percent of the passenger miles were generated by intrastate passengers,

> 22 percent of the expenses were allocated to intrastate service. However, it is well established that total operating unit costs generally decline with length of haul. Because certain costs (such as ticketing, baggage handling, and station expenses) do not vary proportionately with the length of the trip, costs per mile for shorter, intrastate trips are typically higher than those for longer, interstate trips.

The faulty allocation method, the ICC pointed out (*ibid.*), would lead to the anomalous result that "the lower intrastate rates charged by Greyhound appear more profitable than the higher rates charged on interstate traffic on the same buses." The ICC concluded (*ibid.*):

> There is no explanation in the record for this result other than the faulty cost and/or revenue allocation method relied upon by the State. The APSC submitted no evidence explaining this result based upon differences in the operating characteristics of intrastate versus interstate traffic. Ultimately, APSC failed to demonstrate any factors or conditions peculiar to the Alabama intrastate movements that would justify lower intrastate fares and rebut the presumption.

In addressing (App., *infra*, 8a) the APSC's alternative argument that the fare increase prescribed by the Commission was without a rational basis, the ICC held that the record was "more than adequate to demonstrate that Greyhound's 20% increase was reasonable in the context of eliminating the presumptive burden on interstate commerce." The ICC pointed out (*id.* at 9a (footnote omitted)) that the rate increase

> does not even bring the intrastate fares up to the comparable interstate fare level, and we believe that fact alone is an adequate basis under Section 11501(e) for prescribing the intrastate fare increase sought by

Greyhound. In the absence of any evidence or basis for prescribing a lower fare, Greyhound is entitled to the increase proposed.

On APSC's petition for judicial review, the Eleventh Circuit summarily affirmed the Commission by judgment order.

ARGUMENT

The judgment below is consistent with the congressional mandate in the Bus Act to relieve interstate bus carriers of discriminatory state regulation, and is consistent with prior ICC decisions under the same legislation. Moreover, the Eleventh Circuit's summary affirmance of the ICC's decision is consistent with the decisions of two other courts of appeals that have reviewed ICC decisions under the Bus Act. In one of those, *Commissioner of Transportation* v. *ICC*, 750 F.2d 163 (2d Cir. 1984), cert. denied, No. 84-1135 (Apr. 15, 1985), this Court recently denied a petition for a writ of certiorari in which petitioners raised substantially the same issue raised here.

1. Petitioner's principal argument (Pet. 14-20) is that the ICC and the court of appeals failed to follow certain criteria established by this Court for determining, on a case-by-case basis, when intrastate fares unreasonably burden interstate commerce. More specifically, petitioner contends that this Court has created a requirement that the expenses and revenues of a regulated industry be allocated between intrastate and interstate services as a prerequisite to a finding that state regulation is unduly burdensome (*id.* at 15-16), except where conditions are substantially the same (*id.* at 18). Thus, petitioner suggests (*id.* at 17), the ICC erred in "refus[ing] to consider operating ratios because they involve the allocation of expenses."

a. The principal error in petitioner's analysis lies in the assumption that this Court's earlier decisions addressing

specific issues in the federal preemption of state *rail* ratemaking decisions under former Section 13(4) of the Interstate Commerce Act (49 U.S.C. (1976 ed.))[4] apply to the exercise of the ICC's current authority under the Bus Act. Those decisions are inapposite however, because the Bus Act established a specific procedural and substantive mechanism for making the determination whether intrastate bus fares unreasonably burden interstate commerce.

In each of the rail rate cases under former Section 13(4) relied upon by petitioner (Pet. 15), the central issue concerned the nature and adequacy of the ICC's factual findings leading to its ultimate conclusion that the intrastate rail rates constituted a burden on interstate commerce.[5] By

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[4] *Public Service Commission* v. *United States,* 356 U.S. 421 (1958) (challenge to ICC order preempting state holddown on intrastate rail rates); *Chicago, M., St. P. & Pac. R.R.* v. *Illinois,* 355 U.S. 300 (1958) (same); *King* v. *United States,* 344 U.S. 254 (1952) (same); and *North Carolina* v. *United States,* 325 U.S. 507 (1945) (same). Congress amended that statute to strengthen the ICC's hand in exercising jurisdiction over intrastate rail rates in the Transportation Act of 1958, Pub. L. No. 85-625, § 4, 72 Stat. 570. See, *e.g.,* S. Rep. 1647, 85th Cong., 2d Sess. 19-21 (1958). Then Section 214 of the Staggers Rail Act of 1980, 49 U.S.C. 110501(b)-(d), vested the ICC with still more expansive preemptive authority over intrastate rail rates. Recognizing the effect of these statutory changes, several lower courts have found that decisions petitioner relies on are no longer controlling, even in rail ratemaking cases. See *Commissioner of Transportation,* 750 F.2d at 169; *Utah Power & Light Co.* v. *ICC,* 747 F.2d 721, 736 (D.C. Cir. 1984); *Texas* v. *United States,* 730 F.2d 339 (5th Cir. 1984), cert. denied, No. 83-2101 (Oct. 9, 1984); *Kentucky Utilities Co.* v. *ICC,* 721 F.2d 537, 542-543 (6th Cir. 1983); cf. *Wheeling-Pittsburgh Steel Corp.* v. *ICC,* 723 F.2d 346 (3d Cir. 1983).

[5] *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 831 (1945), involved an order of the Federal Power Commission under the Natural Gas Act, and, like the rail cases relied upon by petitioner, focused on the adequacy of the agency's factual findings and methodology. Similarly, in those very early cases involving allegations of confiscatory state telephone rate regulation (*Smith* v. *Illinois Bell Telephone Co.,* 282 U.S. 133 (1930)), the central issues concerned the appropriate methods and findings adequate to support a finding of discriminatory state regulation.

contrast, in this case under the Bus Act, the finding of a burden on interstate commerce is premised on a statutory presumption that, as petitioner concedes, was properly triggered. See Pet. 7-8; Pet. App. 8a-9a. Thus there can be no dispute here about the adequacy of findings to support the presumption; the issue in this case is whether the evidence relied upon by the APSC was sufficient to overcome the statutory presumption of a burden on interstate commerce and, on that issue, the decisions relied on by petitioner are not controlling.

b. Petitioner's argument regarding the allocation of expenses and revenues[6] ignores the substantial attention the ICC has devoted to the issue, in its decisions here (Pet. App. 11a-12a; App., *infra*, 5a-8a) and prior cases (see *e.g.*, Pet. App. 22a-31a, and authorities cited), particularly as it affects the calculation of operating ratio evidence. As have other state authorities in the past, the APSC seeks to rely on such evidence as a short cut to demonstrate that lower intrastate bus fares can be justified simply because the operating ratio shows the intrastate service to be more profitable than the interstate, even though the interstate fare level is higher. The ICC is under no obligation to accept such evidence uncritically, and has consistently refused to accept the anomalous results of such evidence as sufficient

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[6]Contrary to petitioner's suggestion (Pet. 15), we do not read this Court's decisions as establishing a general requirement that an allocation of expenses and investment be made as a prerequisite to demonstrating that intrastate rate levels impose an unreasonable burden on interstate commerce, in this context or any other. In any event, the Bus Act creates a presumption of a burden on interstate commerce that is triggered whenever any of four factual situations are shown to exist, including where the state has taken no action for 120 days (49 U.S.C. 11501(e)(2)(A)(iii)), or where general increases in intrastate fares have been held below the level of general increases in interstate fares (49 U.S.C. 11501(e)(2)(B)). Neither showing requires any allocation of expenses.

to rebut the statutory presumption. The ICC has pointed out (*e.g.*, Pet. App. 24a) that interstate and intrastate service are ordinarily identical,[7] with the same personnel providing the same service simultaneously with the same equipment; that methods of allocating costs in such situations are inherently arbitrary (*ibid.;* App., *infra,* 6a-7a);[8] and that the anomalous result of the lower intrastate fares appearing to be more profitable than the higher interstate fares is explained by arbitrary or faulty allocation of costs and revenues between the two kinds of service. See App., *infra,* 7a (operating ratios relied upon by Alabama were premised on an allocation method that applied only one variable—passenger miles—despite the fact that it is well-established that many costs do not vary proportionately with mileage). The ICC's explanation for refusing to accept such evidence as sufficient to rebut the statutory presumption has been affirmed by two courts of appeals, *Commissioner of Transportation* v. *United States,* 750 F.2d at 170;[9]

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[7]Petitioner's belated reliance here (Pet. 18-19) on one questionable example of how the conditions on intrastate and interstate service may differ should be disregarded by the Court. If the intrastate operations between Birmingham and Anniston are substantially different from the interstate service provided, and if the differences are typical of the differences between intrastate Alabama operations and interstate bus operations, so as to render the presumption under Section 11501(e)(2)(B) either rebutted or inapplicable because the intrastate and interstate operations are not comparable, then that argument should have been made to the ICC. It was not and therefore is not properly before this Court. See *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council,* 435 U.S. 519, 553-554 (1978); *United States* v. *L.A. Tucker Lines, Inc.,* 344 U.S. 33, 36-37 (1952).

[8]Even in the railroad industry, operating ratio evidence long has been regarded as suspect because of the difficulties in allocating expenses between operations. See generally the dissent in *Public Service Commission* v. *United States,* 356 U.S. 421, 429-463 (1958) (Frankfurter, J.).

[9]Petitioner argues (Pet. 23-24) that the *Commissioner of Transportation* case is not persuasive because, inter alia, "the intrastate operating

Public Service Commission v. *ICC*, 749 F.2d 32 (4th Cir. 1984) (Table); cf. *Texas* v. *United States*, No. 84-4184 (5th Cir. May 28, 1985), slip op. 4455-4456 (affirming ICC's similar rationale rejecting evidence based on revenue per passenger mile; remanded on other grounds).

Contrary to petitioner's suggestion (Pet. 20), the ICC's rejection of the operating ratio evidence does not render the statutory presumption irrebuttable. It does, however, preclude sole reliance on operating ratios, without explanation, to rebut the presumption. The proper way to rebut the presumption, the ICC has explained, is to point to differences in operating conditions, services, or costs that would justify or explain holding down intrastate bus fare levels (Pet. App. 11a-12a).

In the final analysis, petitioner is merely quarrelling with Congress's decision to put the burden on state authorities to demonstrate that lower intrastate rate levels are justified. Accordingly, its argument should be addressed to Congress and not to the courts.

2. Petitioner also argues (Pet. 20-22) that the ICC's order conflicts with decisions of this Court that require a rational basis and evidence to support the rates prescribed. The argument is insubstantial. The Act requires the ICC to prescribe *any* rate if the presumption that intrastate rates impose an unreasonable burden stands unrebutted. As the ICC explained (App., *infra*, 9a), where the increase sought by the carrier does not raise intrastate rates even to the level

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ratio was higher" in that case. The distinction is unimportant. The court of appeals adopted the ICC's general reasoning regarding operating ratio evidence. 750 F.2d at 170.

of the comparable interstate fares, and the state has provided no evidence or basis for prescribing lower intrastate fares, the carrier is entitled to the proposed fares.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1985

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[10]Petitioner also seeks to raise in this Court a question relating to the power of a state commission to require the filing of a rate reduction for intrastate travel. That issue was not raised in Greyhound's appeal to the ICC and was not addressed by the court of appeals. Thus, although the ICC decision refers to this question (Pet. App. 6a n*) the record does not preserve the issue in a manner suitable to disposition by this Court.

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10904

PETITION OF GREYHOUND LINES, INC. FOR REVIEW OF A DECISION OF THE ALABAMA PUBLIC SERVICE COMMISSION PURSUANT TO 49 U.S.C. 11501

Decided: September 4, 1984

By decision served May 21, 1984, we authorized Greyhound Lines, Inc. to increase its intrastate passenger fares in Alabama by 20 percent. The approved fares and rates became effective on June 1, 1984. On that same date, the Alabama Public Service Commission (APSC or State) filed a petition requesting us to stay our May 21 decision pending judicial review. Greyhound filed a reply. Subsequently, on June 12, 1984, the APSC filed a petition for judicial review of our decision with the United States Court of Appeals for the Eleventh Circuit,[1] along with an Emergency Motion for stay of our decision. The court denied the motion of June 12.

In its petition, the APSC contends that a stay is warranted in the circumstances. First, the State asserts that it is likely to prevail on the merits of its court appeal because our decision is contrary to case law and the Bus Regulatory Reform Act of 1982 (Bus Act).[2] The APSC also argues that,

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[1] *Alabama Public Service Commission* v. *ICC and USA*, No. 84-7374 (11th Cir., filed June 12, 1984).

[2] In this context, APSC relies on several cases (*North Carolina* v. *United States*, 325 U.S. 507 (1945), *Public Service Commission of Utah*, 356 U.S. 421 (1958)) in which the Supreme Court, in a closely divided decision, established particularly stringent standards for Commission decisions setting intrastate rail rates in cases involving discrimination

without a stay, the public will be irreparably injured because the bus-riding public in towns served exclusively by Greyhound would, in light of the 20 percent increase and reduced Greyhound rates at non-exclusive points, be charged fares at least 30 percent higher than passengers at non-exclusive points. It adds that while this rate disparity is in effect, members of the public at these exclusive points will assertedly incur unrecoverable additional costs for bus transportation and, in fact, the disparity may well cause some individuals to forego travel or to travel by a less convenient mode. The State also asserts that a stay would not substantially harm Greyhound because the carrier currently realizes substantial net income on its Alabama intrastate service. Finally, the APSC contends that, in considering all of these factors, the public interest favors a grant of the stay.

In reply, Greyhound contends that the APSC's request for a stay is too late inasmuch as the rate increase has already been implemented where competitive conditions permit. It adds that the belated granting of a stay would not only perpetuate the discrimination and unreasonable burden imposed on interstate passengers which have persisted for so long under Alabama's regulatory ratemaking regime, but also financially harm its already unprofitable

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against interstate commerce under former Section 13(4) of the Act, 49 U.S.C. 13(4). Those cases are not controlling here. Both antedate enactment of significant statutory reforms designed to *facilitate* Commission decision-making in cases involving intrastate *rail* rates (*see e.g.*, Pub. L. 85-625, § 4, 72 Stat. 570 (1958); Pub. L. 96-448, § 214, 94 Stat. 1913 (1980)), and do not of course address the very specific new statutory provision of the Bus Act under which the Commission is acting in this case. The statutory scheme established by Congress under 49 U.S.C. 11501(e) recasts the prior federal/state scheme for regulation of the bus industry, by providing specific substantive standards and procedures for eliminating burdensome state regulation, and thereby renders those earlier decisions inapposite.

nationwide and Alabama intrastate operations. Moreover, Greyhound contends that, since the rate increase has already been implemented, the State's belated request will not maintain the status quo, but, rather, will work a hardship on it by depriving it of needed revenues and compel it to roll back rates from current levels. Finally, Greyhound argues that our conclusion that it has established conclusively the comparative rate presumption at 49 U.S.C. 11501(e)(2)(A)(i) was proper in all respects.[3]

As we pointed out in our stay decision in No. MC-C-10901, *Petition of Greyhound Lines, Inc. for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501*, served June 25, 1984, a stay of an agency action pending judicial review is an extraordinary action that should not be taken except in the most unusual situations. *Middlewest Motor Freight Bureau* v. *United States*, 443 F.2d 212, 242 (8th Cir. 1970). A stay is not a routine action taken simply because an agency action alters the *status quo*; if that were the rule, most agency actions would be stayed pending judicial review. Cf. *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301 (1976) (Opinion of J. Rehnquist in chambers). Rather, as the United States Court of Appeals for the Fourth Circuit and other courts have held, a party seeking a stay pending judicial review of an agency action must establish: (1) that it will suffer irreparable harm absent a stay, (2) that a stay will not substantially harm other parties, (3) that it has a substantial likelihood of prevailing on the merits, and (4) that the public interest favors a stay. *Blackwelder* v. *Seilig*, 550 F.2d 189, 194 (4th Cir. 1977); *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259

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[3]Subsection 11501(e)(2)(A)(i) establishes a rebuttable presumption that a prescribed rate, rule, or practice applicable to intrastate transportation of passengers unreasonably burdens interstate commerce if it results in the carrier charging an intrastate rate which is lower than the rate applicable to comparable interstate service.

F.2d 921 (D.C. Cir. 1958). The APSC has met none of these criteria, as discussed below. Accordingly, we will not stay our decision.

Regarding irreparable harm, the burden of demonstrating such harm is heavy, because a stay is an extraordinary and drastic remedy. *Canal Authority of State of Florida* v. *Callaway*, 489 F.2d 567, 572-573 (5th Cir. 1974). The *Virginia Petroleum* court said of the requirement of irreparable injury (259 F.2d at 925, emphasis in original): "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy . . . are not enough."

In applying that standard here, we conclude that the State has failed to satisfy its evidentiary burden. First, the APSC's argument regarding unrecoverable additional costs involves the very kind of mere monetary loss that has generally been held insufficient to establish irreparable harm. We also reject the State's characterization of these costs as "unrecoverable." As we stated in our stay decision in No. MC-C-10901, *supra*, while it may be impractical and costly to order restitution to each individual passenger who travels by Greyhound pending judicial review, there are numerous ways to fashion a remedy for any overcharges that may have been imposed on the public. Finally, we find no merit in State's unsubstantiated claim that some persons may have to change their travel plans as a result of our approving the fares increase sought here. In any event, however, because Greyhound has established that its existing intrastate passenger fares unreasonably burden and discriminate against interstate commerce, we conclude that even if some harm to certain individuals were to result from the increase, that harm would clearly be outweighed by the benefits to the bus-riding public in general from removal of this unreasonable burden and discrimination.

Conversely, were we to stay our decision and ultimately prevail on review, Greyhound would be deprived of much-needed additional intrastate revenues that it was lawfully entitled to, but could never recover. Moreover, the existing rate structure would continue to unreasonably burden interstate commerce, thereby prolonging interstate customers' cross-subsidization of intrastate services. As we explained in our prior decision, maintaining this rate disparity results in a subsidization of Greyhound's Alabama intrastate operations by its Alabama interstate operations. This is exactly the type of cross-subsidization of transportation costs that Congress sought to eliminate through the enactment of Section 17 of the Bus Act [49 U.S.C. 11501(e)]. In addition, a stay would increase the chances that Greyhound's investment and service decisions, based on the existing, skewed rate structure, will result in inefficient allocation of resources contrary to the national transportation policy. See, e.g., 49 U.S.C. 10101(a)(2)(C) and (D). Accordingly, because Greyhound, and not the public, could be seriously harmed by the imposition of a stay here, we conclude that the APSC has not met its evidentiary burden as to this criterion.

Finally, the APSC has not established that it is likely to succeed on the merits. Section 17 of the Bus Act establishes a rebuttable presumption that intrastate rates impose an unreasonable burden on interstate commerce if the bus carrier shows that its intrastate rates are lower than the rates it charges for comparable interstate transportation [Section 11501(e)(2)(A)(i)]. The APSC conceded in its pleadings before the Commission that Greyhound has invoked the statutory presumption by establishing that its Alabama intrastate rates are lower than its interstate rates for comparable transportation, thereby requiring the State to rebut the presumption. Thus, the sole issue before us was whether the evidence presented by the APSC was sufficient to rebut the statutory presumption. We concluded that it was not.

The sole evidence relied upon by the APSC in this proceeding to rebut the rate disparity presumption was various operating ratio calculations. The operating ratios introduced by the State for Greyhound's Alabama intrastate operations were 90.39 percent before the increase and 84.91 percent after, versus a 101.28 percent operating ratio for the carrier's combined intrastate-interstate Alabama operations. The APSC contended that these operating ratios established that Greyhound's intrastate operations are not only profitable at current fare levels, but, in fact, are more profitable than its interstate operations and are actually subsidizing those operations.[4] The APSC, therefore, concluded that such ratios effectively rebut the statutory presumption that Greyhound's intrastate rates are unreasonably burdening interstate commerce.

However, because the operating ratio evidence relied upon by the APSC in this case was inherently flawed for the same reasons as that relied upon by the WVPSC in No. MC-C-10901, *supra*, we concluded that APSC's operating ratios were not, in fact, sufficiently reliable to rebut the statutory presumption raised by the rate discrepancies. As we explained in our stay decision in No. MC-C-10901, *supra*, where intrastate and interstate operations are the *same* (i.e., performed on the same bus), it is impossible to

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[4]As discussed below, we do not believe the evidence of profitability, based solely upon operating ratios, is valid because of the arbitrary means of allocating expenses between intra-and interstate traffic. In any event, the fact that intrastate rates at the pre-existing level may have been "profitable" in the sense that revenues exceed expenses, standing alone, is not controlling here. APSC was required to demonstrate the reasonableness of the disparity between the intrastate fares and the higher interstate fares by identifying differences in operating conditions, services, or costs between interstate and intrastate operations that would explain and justify the lower intrastate fare level; it failed to do so, as subsequently discussed.

allocate costs between intrastate and interstate operations in a non-arbitrary manner.[5]

In this proceeding, the operating ratio calculations relied upon by the APSC allocated costs strictly on the basis of passenger miles. Since 22 percent of the passenger miles were generated by intrastate passengers, 22 percent of the expenses were allocated to intrastate service. However, it is well established that total operating unit costs generally decline with length of haul. Because certain costs (such as ticketing, baggage handling, and station expenses) do not vary proportionally with the length of the trip, costs per mile for shorter, intrastate trips are typically higher than those for longer, interstate trips. As shown in Greyhound's Exhibit 6A, these kinds of costs, not clearly related to mileage, make up a significant portion of the carrier's operating costs. The cost allocation method used to compute the operating ratios relied upon by the APSC did not adjust for these factors. Indeed, this faulty analysis leads to an anomalous result in this case: the lower intrastate rates charged by Greyhound appear more profitable than the higher rates charged on interstate traffic on the same buses. There is no explanation in the record for this result other than the faulty cost and/or revenue allocation method relied upon by the State. The APSC submitted no evidence explaining this result based upon differences in the operating characteristics of intrastate versus interstate traffic. Ultimately, APSC failed to demonstrate any factors or conditions peculiar to the Alabama intrastate movements that would justify lower intrastate fares and rebut the presumption.

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[5]We have consistently held in prior bus rate cases that the mere citation of aggregate ratios such as *intrastate* operating ratios or revenue per passenger mile is not sufficient to meet the burden of proof in rebutting the statutory presumption of undue burden. For such evidence to be sufficient, the objectors must show that they have adequately accounted for differences in important transportation characteristics between intrastate and interstate service.

Under these circumstances, we concluded that the State had failed to carry its burden of proof. Consistent with our recent decisions in other similar cases, we concluded that the operating ratios relied upon by the APSC, standing alone, were not sufficient to overcome the statutory presumption that the Alabama intrastate rates charged by Greyhound impose an unreasonable burden on interstate commerce. *See*, e.g., No. MC-C-10893, *Petition of Greyhound Lines, Inc., For Review of A Decision of The Railroad Commission of Texas Pursuant to 49 U.S.C. 11501* (not printed), served February 21, 1984.

Finally, APSC argues that we erred in prescribing the 20 percent increase in Alabama intrastate fares (based upon the Greyhound proposal) because the figure is without a rational basis. Under the statute, Section 11501(e)(1), we are directed to "prescribe any rate" for intrastate transportation if (1) a State has denied a carrier request to establish a particular rate, and (2) we find that "the rate in effect and applicable" causes unreasonable discrimination against or imposes an unreasonable burden on interstate commerce. With those prerequisites established here, we were obligated to "prescribe" rates. Although the record in this case was not adequate to enable us to prescribe the precise level of intrastate rates that would yield revenues sufficient for Alabama intrastate traffic to cease burdening interstate commerce and to contribute precisely its "fair share" — an unrealistic and unattainable standard which we do not believe Congress contemplated that the Commission would undertake in the 60-day period permitted under Section 11501(e) — the record was more than adequate to demonstrate that Greyhound's 20 percent increase was reasonable in the context of eliminating the presumptive burden on interstate commerce here. In Section 11501(e)(2)(A), Congress has essentially made a legislative finding that, unless the disparity is justified and shown reasonable, lower intrastate fares constitute such a burden on interstate commerce.

See generally S. Rep. No. 97-411, 97th Cong., 2d Sess. 7-8 (1982); H. Rep. No. 97-334, 97th Cong., 1st Sess. 25-26, 44 (1982). Here, the 20 percent increase does not even bring the intrastate fares up to the comparable interstate fare level, and we believe that fact alone is an adequate basis under Section 11501(e) for prescribing the intrastate fare increase sought by Greyhound. In the absence of any evidence or basis for prescribing a lower fare, Greyhound is entitled to the increase proposed.[6] Accordingly, we do not believe that the APSC has shown any substantial likelihood that it will prevail on the merits.

For all of these reasons, we find that the public interest and a balancing of the equities do not favor issuance of an administrative stay in this proceeding. Accordingly, we conclude that the petition should be denied.

It is ordered:

The petition for a stay is denied.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterratt and Gradison.

James H. Bayne
Secretary

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[6]In a proceeding under Section 11501(e), where the carrier successfully relies on the presumption under subsection (e)(2)(A)(i), the reasonableness of the comparable interstate fares is normally not at issue, either in the State proceeding or before the Commission. For that reason, an analysis and review of the reasonableness of the interstate rate level is not normally made. If any person believes that the fare level for the "comparable interstate transportation of passengers" under subsection (e)(2)(A)(i) is itself unreasonable, they may file a formal complaint with the Commission under 49 U.S.C. 11701.

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No. 84-1617

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION,

Petitioner

V.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and GREYHOUND LINES, INC.,

Respondents

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Interstate Commerce Commission can refuse to allocate expenses between interstate and intrastate bus service in intrastate rate cases under the Bus Regulatory Reform Act.

2. Whether the Interstate Commerce Commission can prescribe an intrastate bus rate increase without evidence supporting the amount of the increase.

3. Whether the Bus Regulatory Reform Act preempts state laws requiring the filing of intrastate rate reductions.

PARTIES

The caption of this petition contains the names of all parties to this action in the Eleventh Circuit. The Alabama Public Service Commission is an agency of the State of Alabama.

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REPLY BRIEF

OPINIONS BELOW

Neither the decision of the Interstate Commerce Commission nor the opinion of the Eleventh Circuit is reported in any official or known unofficial report.

It should be noted that another decision has been entered under the Bus Regulatory Reform Act, and a Petition for Certiorari is pending. Commissioner of Transportation v. United States, 750 F.2d 163 (2nd Cir., 1984); Petition for Certiorari pending, No. 84-1135.

JURISDICTION

The Judgment of the Eleventh Circuit was entered on February 22, 1985. No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The statute involved is Section 17 of the Bus Regulatory Reform Act of 1982, codified at 49 U.S.C. 11501(e) (1984 Supp.). This provision is printed in the Petition, beginning at page 3.

ARGUMENT

Amount of the Rate Increase

This reply brief is directed solely to the argument that the Interstate Commerce Commission can select any figure for the intrastate rate it sets. Brief for the Federal Respondents in Opposition, pages 11 and 12. This assertion is clearly contrary to 49 U.S.C. 11501(e)(1) and shows that this case should be heard.

49 U.S.C. 11501(e)(1) gives the ICC the power to prescribe any provision in a carrier's intrastate tariff, including rules, practices, one-way fares, round-trip fares, etc. The word "any" cannot be taken out of context to authorize any decision or award. Manifestly, the words

selected by Congress and the congressional intent are severely mangled if, as the Federal Respondents assert, the ICC can simply approve whatever the carrier seeks or arbitrarily select any other figures for a rate prescription.

CONCLUSION

The Interstate Commerce Commission has misconstrued and misapplied 49 U.S.C. 11501(e)(1). For this reason and the other reasons stated in the petition, the petition should be granted and this case should be heard.

Respectfully submitted,

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